UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY FIORANELLI,

Plaintiff,

-against-

CBS BROADCASTING INC., BBC WORLDWIDE AMERICAS, INC., T3MEDIA, INC., BROOK LAPPING PRODUCTIONS LTD., TESTIMONY FILMS, RTW PRODUCTIONS, LLC, PARAMOUNT PICTURES CORPORATION, MORNINGSTAR ENTERTAINMENT, INC., MONKEY KINGDOM LIMITED, CREATIVE DIFFERENCES, LLC, ADAMS COUNTY PRODUCTIONS LLC, TELEMACO SRL, JVCT PRODUCTIONS, INC., IPSE DIXIT, INC., FIRECRACKER FILMS, LLC, A&E TELEVISION NETWORKS, LLC, JOHN AND JANE DOES 1-10, JOHN DOE CORPORATIONS 1-10, and JOHN DOE ENTITIES 1-10,

Defendants.

Case No. 15-CV-00952 (VSB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RULE 12(b)(2) MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

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PRELIMINARY STATEMENT

Defendants Testimony Films, Ltd. ("Testimony") and Monkey Kingdom Ltd. ("MK") have joined in the concurrent motion to dismiss the Complaint made by the other appearing defendants. They submit this memorandum of law in support of their separate motion, pursuant to Federal Rule of Civil Procedure 12(b)(2), to dismiss the claims against them because this Court lacks personal jurisdiction over them.

Plaintiff Anthony Fioranelli ("Fioranelli") claims that CBS Broadcasting Inc. ("CBS") undertook a "program of sublicensing" video containing a portion of his footage of the terrorist attacks on 9/11 (the "Footage"). Apparently trying to enhance the settlement value of his claims, Fioranelli sued not only CBS, but 15 other companies, along with many unknown John Doe Defendants, including sub-sub-licensees of CBS, like Testimony and MK, who used a few seconds of the Footage in their respective works. Testimony and MK, however, are foreign companies not subject to jurisdiction in this Court. Fioranelli admits that neither entity is incorporated or has its principal place of business in the United States, much less in New York. Rather, the Complaint concedes that each has its place of business in, and is organized under the laws of, the United Kingdom. The Complaint sets forth no facts that, if true, could establish that these two UK companies have the requisite minimum contacts with this forum.

Because Fioranelli's allegations do not even establish a prima facie case of jurisdiction over these two foreign defendants, Fioranelli is not entitled to take discovery on this issue. *See, e.g.*, *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185 (2d Cir. 1998); *Warner Bros. Entm't Inc. v. Ideal World Direct*, 516 F. Supp. 2d 261, 267 (S.D.N.Y. 2007). The Court should dismiss all claims against Testimony and MK for lack of personal jurisdiction.

STATEMENT OF FACTS[1]

Testimony is "a company organized and existing under the laws of the United Kingdom." Compl. ¶ 7. Its place of business is "at 12 Great George Street, Bristol, BS1 5RH, Great Britain." *Id.* Defendant MK is also "a company organized and existing under the laws of the United Kingdom." *Id.* ¶ 11. Its place of business is "at Tea Building, Unit 5.01, 55 Shoreditch High St., London E1 6JJ, United Kingdom." *Id.*

Fioranelli filmed certain events during the terrorist attacks on 9/11. *Id.* ¶ 23. In 2002, Fioranelli entered into an agreement with CBS pursuant to which he licensed some of his footage to CBS (the "Footage"). *Id.* ¶¶ 25, 117.

Fioranelli asserts that, without obtaining his permission, CBS sublicensed the Footage to defendant BBC Worldwide Americas, Inc. ("BBC"). *Id.* ¶ 4. "BBC is a wholly owned subsidiary of the British Broadcasting Corporation," and its commercial activities—including "commercializing and showcasing [its] content"—are conducted not just in the United States but "around the world." *Id.*

In 2006, "BBC and Testimony entered into a licensing agreement." *Id.* ¶ 30. "Subsequently, Testimony used the footage of Plaintiff's the [sic] Copyrighted Works without authorization in his [sic] 50-minute project named 'The Miracle of Stairwell B.'" *Id.* Testimony entered into two additional agreements with BBC, in 2007 and 2012. *Id.* ¶¶ 31, 32. "Subsequently, Testimony used the footage of Plaintiff's the [sic] Copyrighted Works" in "his [sic] 60-minute project named 'The Miracle Survivor,'" and in "his [sic] 60-minute project named 'Crime Scene 9-11.'" *Id.*

[1] For purposes of this motion only, and as required on a motion to dismiss, the following facts are based on Fioranelli's Complaint and any exhibits attached thereto. Defendants do not concede that any of the allegations in the Complaint, or repeated herein, are true.

In 2006, "BBC and MK entered into a licensing agreement." *Id.* ¶ 35. "Subsequently, MK used the footage of Plaintiff's the [sic] Copyrighted Works" in "his 45-minute project named '911 Liars.'" *Id.*

Other than as described above, the Complaint sets forth no specific facts regarding either Testimony or MK.

ARGUMENT

I. LEGAL STANDARD

A plaintiff bears the burden of establishing that a court has jurisdiction over a defendant. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). To survive a Rule 12(b)(2) motion to dismiss prior to discovery, a plaintiff must make a prima facie showing of jurisdiction by alleging facts in the complaint, which if true, are sufficient to establish jurisdiction. *See, e.g.*, *Jazini*, 148 F.3d at 184; *BWP Media USA Inc. v. Hollywood Fan Sites, LLC*, 69 F. Supp. 3d 342, 349 (S.D.N.Y. 2014). Although jurisdictional allegations are construed in the plaintiff's favor, "the Court will not 'draw argumentative inferences in the plaintiff's favor, nor accept as true a legal conclusion couched as a factual allegation.'" *BWP Media*, 69 F. Supp. 3d at 350 (citation omitted). Where a plaintiff alleges "broad conclusory statements" that are merely "rote restatements of the relevant statutory language," dismissal of the complaint is proper. *Capitol Records, L.L.C. v. SeeqPod, Inc.*, No. 09 Civ. 01584(LTS)(KNF), 2010 WL 481228, at *4-5 (S.D.N.Y. Feb. 1, 2010).

Deciding a motion to dismiss for lack of personal jurisdiction requires the Court to (1) first determine whether there is a statutory basis for exercising personal jurisdiction, and (2) then decide whether exercising jurisdiction comports with due process. *See, e.g.*, *BWP Media*, 69 F. Supp. 3d at 349-50 (citing *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 42 (2014); *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224 (2d Cir. 2014) (per curiam), *cert. denied*, 134 S. Ct. 2888 (2014)). "In the statutory portion of the analysis, the court in a federal question case [such as this case] 'applies the forum state's personal jurisdiction rules.'" *Id.* (citation omitted). Accordingly, New York's statutory law applies here.

New York law authorizes both general and specific jurisdiction over non-domiciliary defendants. N.Y. C.P.L.R. §§ 301, 302; *see, e.g.*, *Capitol Records*, 2010 WL 481228, at *3. If a plaintiff fails to allege sufficient minimum contacts between the non-domiciliary defendant and the forum to establish general or specific jurisdiction, then the Court's inquiry ends. *See, e.g.*, *Met. Life. Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996). But even if the Court finds a plaintiff has alleged sufficient minimum contacts for the assertion of general or specific jurisdiction over a defendant, the Court must—in complying with due process principles—still determine "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *See, e.g.*, *id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Should the Court find the exercise of jurisdiction to be unreasonable under due process principles, jurisdiction may be defeated entirely even if the minimum contacts adequately have been pled. *Id.* at 568-69.

II. PLAINTIFF HAS NOT ALLEGED A PRIMA FACIE SHOWING OF JURISDICTION

Here, Fioranelli's Complaint falls far short of "making a prima facie showing of jurisdiction." *See, e.g.*, *Jazini*, 148 F.3d at 184 (internal marks omitted). His Complaint is simply devoid of facts establishing any contact with this forum by either Testimony or MK.[2]

[2] Courts have recognized that where, as here, a plaintiff's allegations do not even establish a prima facie case of jurisdiction, the plaintiff is not entitled to take discovery on this issue. *See, e.g.*, *Jazini,* 148 F.3d at 185; *Warner Bros. Entm't*, 516 F. Supp. 2d at 267. Such a holding makes all the more sense in the present case, where, by

A. Plaintiff Has Not Adequately Alleged The Existence Of General Jurisdiction

To establish general jurisdiction, Fioranelli must allege facts sufficient to establish that Testimony and MK have such "continuous and systematic" contacts with New York as to render them "essentially at home in [New York]." *See, e.g.*, *BWP Media*, 69 F. Supp. 3d at 350 (quoting *Sonera Holding*, 750 F.3d at 225) (internal marks and citation omitted); *Capitol Records*, 2010 WL 481228, at *3 (citing *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006)); *Jacobs v. Felix Bloch Erben Verlag fur Buhne Film und Funk KG*, 160 F. Supp. 2d 722, 731 (S.D.N.Y. 2001) ("Second Circuit decisions have clarified that [general jurisdiction] requires a showing of '"continuous, permanent, and substantial activity in New York.'" (citations omitted)). The Supreme Court recently clarified that "the 'paradigm bases' for determining the place where a corporation is 'at home' are 'the place of incorporation and the principal place of business.'" *BWP Media*, 69 F. Supp. 3d at 350 (citing *Daimler v. Bauman*, 134 S. Ct. 746, 760 (2014) (additional citation omitted)).

Fioranelli fails to establish that the Court has general jurisdiction over Testimony and MK because he pleads *no* facts regarding their contacts—much less "continuous and systematic" contacts—with New York so as to render them "essentially at home" in this forum. *See, e.g.*, *BWP Media*, 69 F. Supp. 3d at 350. Indeed, other than alleging that Testimony and MK (1) are domiciled in the *United Kingdom*—which independently should vitiate the Court's exercise of

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Fioranelli's own admission, the moving parties are foreign corporations, Compl. ¶¶ 7, 11, which would likely increase the cost of discovery. As the Second Circuit explained when rejecting discovery based on sparse jurisdictional allegations similar to Fioranelli's:

> [I]t would not be difficult for a plaintiff suing a multinational foreign corporation in the federal courts in New York, to make similar conclusory non-fact-specific jurisdictional allegations and thus obtain extensive discovery on that issue. This would require the federal courts to conduct substantial jurisdictional discovery over foreign corporations—a practice in which they have not hitherto engaged. We decline to require that step.

Jazini, 148 F.3d at 185.

general jurisdiction, *see Daimler*, 134 S. Ct. 746—and (2) that they entered into agreements with BBC, Compl. ¶¶ 7, 11, 30-32, 35, Fioranelli does not allege any particularized facts regarding them. Instead, he simply refers vaguely to "all Defendants" collectively, but "[l]umping all the 'defendants' together for purposes of alleging connections to New York is . . . patently insufficient" to establish personal jurisdiction. *Cenage Learning, Inc. v. Buckeye Books*, 531 F. Supp. 2d 596, 599 (S.D.N.Y. 2008). As the Supreme Court recently made clear, "'[o]nly on truly "exceptional" occasions may general jurisdiction extend over individuals who are "at home" in a state that is not otherwise their domicile.'" *BWP Media*, 69 F. Supp. 3d at 350 (quoting *Reich v. Lopez*, 38 F.3d 436, 455 (S.D.N.Y. 2014) (citation omitted)). This is not one of them.

B. Plaintiff Has Not Adequately Alleged The Existence Of Specific Jurisdiction

Fioranelli also fails to establish specific jurisdiction over Testimony and MK under New York's long-arm statute. *See* N.Y. C.P.L.R. § 302(a); *Capitol Records*, 2010 WL 481228, at *4-5. To establish specific jurisdiction, Fioranelli must make "specific factual allegations" that these defendants either (1) transacted business within New York and that Fioranelli's action arises from that transaction of business; (2) committed a tortious act in New York and that Fioranelli's action arises from the tortious act; or (3) committed a tortious act outside of New York that caused injury in New York, *and* that Testimony and MK either (a) regularly engage in business or other conduct in, or derive substantial revenue from, New York, or (b) expect or should expect the tortious act to have consequences in New York and derive substantial revenue from interstate or international commerce, and that Fioranelli's action arises from the tortious act. *See* N.Y. C.P.L.R. § 302(a); *Capitol Records*, 2010 WL 481228, at *4-5.

1. Plaintiff Has Not Alleged That Testimony Or MK "Transacted Business" In New York

First, Fioranelli does not adequately allege that either Testimony or MK "transact[ed] business" in New York, which requires an "assessment of the sum of the defendant's activities,"[3] including:

> (1) whether the defendant has an on-going contractual relationship with a New York corporation; (2) whether the contract was negotiated or executed in New York and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship; (3) what the choice-of-law clause is in any such contract; and (4) whether the contract requires notices and payments to be sent into the forum state or requires supervision by the corporation in the forum state….

Pieczenik v. Dolan, No. 03 Civ. 6336(SAS), 2003 WL 23095553, at *3 (S.D.N.Y. Dec. 30, 2003) (quotation marks and citations omitted) (declining to exercise jurisdiction over British resident, even though it had a contract with a New York-based plaintiff, because the contract was negotiated in England and did not contain a choice-of-law provision, and therefore did not amount to "transacting business" in New York). Moreover, "[i]t is well-settled that the relationship between [a plaintiff's] claim and the in-state transaction must be 'direct.'" *Jacobs*, 160 F. Supp. 2d at 739 (citations omitted).

Here, Fioranelli has not alleged *any* facts in support of the foregoing factors so as to suggest that either Testimony or MK "purposefully avail[ed] [themselves] of the privilege of conducting activities within New York." *Navaera Sciences*, 667 F. Supp. 2d at 374. For example, Fioranelli does not allege that Testimony's or MK's allegedly infringing films were

[3] In this regard, Fioranelli's own contacts with New York, including the creation of the Footage in New York, are wholly irrelevant in determining whether the Court has personal jurisdiction over Testimony and MK because the "Court's inquiry centers instead on *defendant's* activities in New York." *See, e.g.*, *Navaera Sciences, LLC v. Acuity Forensic Inc.*, 667 F. Supp. 2d 369, 375 (S.D.N.Y. 2009) (emphasis added) (noting that plaintiff's allegations regarding "its development and maintenance of intellectual property and its execution of [a sales agreement with defendant] in New York" were a "bootless" exercise because a "plaintiff's unilateral activities cannot support a finding of personal jurisdiction over a defendant"); *PaineWebber Inc. v. Westgate Grp., Inc.*, 748 F. Supp. 115, 119 (S.D.N.Y. 1990) ("[T]he focus of a C.P.L.R. 302 inquiry is on what defendant *Westgate* did in New York in connection with the cause of action." (emphasis in original)).

distributed or broadcast in New York. At most, he asserts that Testimony and MK each had a contract with BBC, but "the mere fact that an out-of-state defendant enters into a contract with a company headquartered in New York does not establish the requisite minimum contacts unless that contract 'projects the defendant into the New York market.'" *Id.*, 667 F. Supp. 2d at 375 (alterations omitted). Fioranelli concedes that BBC conducts business "around the world," and does not allege that Testimony and MK dealt with BBC's office in New York, as opposed to its offices in the UK. Fioranelli simply does not allege that the negotiations for, execution of, or any other act in connection with any of these agreements occurred in New York, or that Testimony or MK were going to perform or otherwise derive any benefit from the agreements in New York. *See id.*

Moreover, Fioranelli cannot establish that Testimony or MK were "transacting business" in New York based on the fact that they were downstream licensees of a defendant (CBS) with connections to New York. *Cf. Viacom Int'l, Inc. v. Melvin Simon Prods., Inc.*, 774 F. Supp. 858, 862-64 (S.D.N.Y. 1991) (declining to exercise jurisdiction over nonresident defendant based on allegations that it was "the assignee of rights acquired under a New York contract" because that did not amount to "transacting business" in New York, where such defendant had "engaged in no activity in New York," and the "prior acts of the [assignor] [could not] be attributed to the [nonresident defendant]"); *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 460 F. Supp. 1238, 1240 (E.D. Mo. 1978) (declining to exercise jurisdiction over nonresident defendant based in the British Isles, even though it granted a license to another defendant, which in turn granted a sublicense to a defendant who *was* subject to the court's jurisdiction because nonresident defendant had not transacted any business, entered into any contract, or committed any act within the forum state), *aff'd*, 606 F.2d 234 (8th Cir. 1979). This is so even if Testimony and MK were aware of the original agreement between CBS and BBC (who are not contesting the Court's jurisdiction), because an "incidental awareness of a third-party agreement will not itself subject a nonresident to jurisdiction in the forum where the third-party agreement was formed or one of the parties to the agreement resides." *See ITN Flix, LLC v. Hinojosa*, No. 1:13-cv-00022-RJS, 2014 WL 2587692, at *7 (D. Utah June 10, 2014) (declining to exercise jurisdiction over nonresident defendants where they did not contract with plaintiff or assent to the terms of plaintiff's agreement with other defendants, and where, although plaintiff had alleged a relationship with the nonresident defendants, the complaint failed "to articulate a substantial connection between the [defendants and the forum state]"). Accordingly, Fioranelli has failed to allege specific jurisdiction under this prong of the long-arm statute.

2. Plaintiff Has Not Alleged That Testimony Or MK "Committed A Tortious Act" In New York

Second, Fioranelli has similarly failed to alleged that Testimony or MK "commit[ed] a tortious act" in New York. He merely alleges that Testimony and MK made unauthorized use of his work. He does not allege that any allegedly infringing conduct occurred in New York, or that Testimony and MK created, broadcast, or distributed their projects in New York. And it is well-established that a court may not assert jurisdiction for a tortious act committed in New York unless a defendant is "physically present" in New York when the allegedly tortious act occurs. *See, e.g.*, *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997).

3. Plaintiff Has Not Alleged That Testimony Or MK Have Any Other Relationship With New York

Finally, although New York's long-arm statute permits a court under certain circumstances to exercise jurisdiction over defendants whose tortious acts occur *outside* of New York but cause injury in New York, Fioranelli has failed to allege facts in support of the statute's attendant requirements that Testimony and MK "(i) regularly do[] or solicit[] business, or engage[] in any other persistent course of conduct, or derive[] substantial revenue from goods used or consumed or services rendered, in [New York], or (ii) expect[] or should reasonably expect the act to have consequences in [New York] and derive[] substantial revenue from interstate or international commerce." N.Y. C.P.L.R. § 302(a)(3). Indeed, this basis for jurisdiction fails for the same reason that any basis for general jurisdiction would fail: the Complaint lacks any allegations whatsoever of any business or conduct Testimony and MK undertake in New York, or of any revenue they derive from the state. Thus, Fioranelli has failed entirely to allege any basis for the Court's exercise of specific jurisdiction.

III. THE EXERCISE OF JURISDICTION WOULD VIOLATE DUE PROCESS

Even assuming there was a basis under New York law for asserting jurisdiction over Testimony and MK—and there is not—such exercise would violate the "traditional notions of fair play and substantial justice" under the Due Process Clause of the Fourteenth Amendment. The factors the Court must consider in the due process inquiry to determine whether the exercise of jurisdiction is "reasonable" include:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Met. Life, 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113-16 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *A.I. Trade Fin. Inc. v. Petra Bank*, 989 F.2d 76, 83 (2d Cir. 1993)).

Here, the foregoing factors militate heavily against a finding that jurisdiction would comply with due process. As to the first factor, "'the *unique burdens* placed upon one who must defend oneself in a foreign legal system should have *significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders*.'" *In re Nazi Era Cases Against German Defs. Litig.*, 153 F. App'x 819, 825 (3d Cir. 2005) (quoting *Asahi*, 480 U.S. at 114 (emphasis added)) (affirming dismissal for lack of personal jurisdiction and noting that "[f]orcing a wholly foreign company with no day-to-day operations to litigate in New York is no small burden"); *see e.g.*, *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993) ("We have held that litigation against an alien defendant requires a higher jurisdictional barrier than litigation against a citizen from a sister state."). Requiring the foreign defendants, which are both based in the UK, Compl. ¶¶ 7, 11, to litigate and appear for a case in New York would impose a tremendous and costly burden on them. Relatedly, as to the fourth factor—which considers "where witnesses and evidence are likely to be located," *Met. Life.*, 84 F.3d at 574—Testimony's and MK's employees with knowledge of any purportedly infringing conduct are in the UK, as would be any records and evidence of whether and how the footage was sublicensed, used, and distributed.

As for the third factor—the plaintiff's interest in obtaining convenient and effective relief—there is no reason that Fioranelli could not obtain adequate relief from the named defendants that are based in the United States, particularly because the entities that allegedly sublicensed Fioranelli's footage to Testimony and MK would still remain in the case. And, consistent with the jurisdictional deficiencies in the Complaint as a whole, Fioranelli has provided no grounds for finding any policy basis for the Court to exercise jurisdiction here under the fifth due process factor. At most, only the second factor may weigh in Fioranelli's favor because New York may have an interest in adjudicating a case to protect the interests of one of its residents. But, this interest cannot overcome the weight the other factors, all of which counsel against the exercise of jurisdiction. Accordingly, even if the Court were to find that Fioranelli has adequately pled a basis for general or specific jurisdiction, the Court should dismiss the Complaint as to Testimony and MK because exercising jurisdiction would deprive them of due process.

CONCLUSION

Fioranelli's bare bones jurisdictional allegations concerning Testimony and MK provide no basis for this Court to exercise personal jurisdiction over those defendants. For the foregoing reasons, Testimony and MK respectfully request that the Court grant their motion to dismiss the Complaint in its entirety as to them for lack of personal jurisdiction, together with such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
July 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2015, I electronically transmitted the foregoing **NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RULE 12(b)(2) MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, as plaintiff's counsel, and all counsel of record:

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